



The Water Cooler

Bricker & Eckler LLP's Human Resources Advisory

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Employer Response to Snow Emergencies

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Winter snow can create some unique and frustrating employment problems for employers. Understanding what is a snow emergency and what an employer can expect of its employees is the first step in dealing with foul weather.

What is a snow emergency?

A sheriff may, pursuant to Ohio law, declare a snow emergency and temporarily close county and township roads within the sheriff's jurisdiction when such action is reasonably necessary for the preservation of the public safety.

What do the different levels of snow emergencies designate?

The sheriff has the discretion to vary the level of warning issued to the public. To distinguish mere warnings from actual roadway closure, the county sheriffs in Ohio have established different levels of snow emergencies. For instance, the guidelines established for Franklin County¹ are as follows:

Level 1

Roadways are hazardous with blowing and drifting snow. Roads are also icy. *Drive very cautiously.*

Level 2

Roadways are hazardous with blowing and drifting snow. *Only those who believe it is necessary to drive should be out on the roadways. Contact your employer to see if you should report to work.*

Level 3

All roadways are closed to non-emergency personnel. No one should be out during these conditions unless it is absolutely necessary to travel. All employees should contact their employer to see if they should report to work. *Those traveling on the roadways may subject themselves to being charged with a misdemeanor.*

What can an employer do during a snow emergency?

Level 1 and Level 2 Snow Emergencies

Where an employee elects to stay home despite a requirement to report to work and is disciplined, that discipline should not expose the employer to any serious liability. Where the discipline results in terminations, the employer may face a wrongful discharge action, but attendance violations are generally considered to be proper basis for discharge, and the employee was not asked to report to work under circumstances that would expose the employee to criminal prosecution.

Level 3 Snow Emergencies

Once a sheriff has declared a Level 3 Snow Emergency in Franklin County, the roads are closed and anyone (non-emergency) traveling on them is subject to being charged with a fourth degree misdemeanor. Employers should review applicable county policy as it may provide discretion to an

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employer to declare its operations as “emergency” based upon the employer’s circumstances. Additionally, each county sheriff has discretion in interpreting and applying county policy.

Many businesses send all employees home when a Level 3 snow emergency has been declared. However, some businesses may want or need to continue some level of operation during such conditions even though their employees are *not* generally considered to be “emergency personnel.”

Any employer that requires its employees to report to work could face a workers’ compensation claim if the employee is injured in the commute, since exposing the employee to this type of danger would be a special hazard caused solely by their employment. Additionally, any discipline for an employee’s decision not to expose oneself to a criminal charge which leads to termination could expose the employer to

a potential claim of wrongful discharge in violation of public policy.

The infrequency of snow emergencies creates uncertainty for employers. If possible, the safest strategy when a Level 3 snow emergency is called is to shut the business down or at least attempt to reduce the size of the workforce to only essential employees. Where that is not practical, the employer must weigh the possible liability factors, some of which are discussed briefly above, against the need to have employees report to work and come to a decision based upon its own accepted level of risk.

Footnote

¹Although it is anticipated that other counties have the same or similar definitions for each level, it is best to contact your county sheriff’s department to get their particular definitions and to ascertain that department’s enforcement policy.

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Exempt Employee Leave and Salary Deductions for Snow Emergencies



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Fortunately, severe inclement weather, such as a snow emergency which prevents employees from reporting to work, is a relatively infrequent event. However, when it does occur it can create some unique compensation issues for an employer—particularly for exempt employees.

Under the Fair Labor Standards Act (FLSA), employers are not required to pay overtime to certain exempt employees. Employees may qualify for this overtime exemption, provided that they meet, among other things, the “salary basis” test. An employee is paid on a “salary basis” if the employee “regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, *which amount*

is not subject to reduction because of variations in the quality or quantity of the work performed.”

Compensation deductions from an exempt employee’s salary; however, may properly be made in several specified situations, including when the employee is absent from work for one or more *full* days for personal reasons, other than sickness or disability. Deductions may also be made for one or more *full* days because of sickness or disability, as long as the deductions are made pursuant to a *bona fide* plan, policy or practice of providing compensation for loss of salary due to sickness or disability. As long as deductions are made in accordance with the FLSA, the employee’s exempt status should not be lost when the employer makes these

deductions. However, improper deductions can be costly because it may cause the employer to lose the exemption for that employee, which may result in substantial overtime liability.

The following guidance should be followed when considering leave and salary deductions for exempt employees as a result of inclement weather:

No Salary Deduction for Office Closed for Less than Workweek

If a private employer closes the office due to inclement weather or other disasters for *less than a full workweek*, the employer must pay the exempt employee's full salary for the week.

Leave Deduction Permitted for Closed Office

A private employer may direct exempt employees to take vacation or debit their leave bank account—for full or partial day absences—as long as the employee receives payment in an amount equal to the guaranteed weekly salary. If the employee has no accrued benefits in his/her leave bank (or a negative balance), the employee must still receive the employee's guaranteed weekly salary.

Leave and Certain Salary Deductions Permitted for Absence When Office is Open

If the office is open, but the employee fails to report to work, an employer may deduct from the employee's leave and under some circumstances his weekly salary, but salary deductions are only permitted for a full day's absence. Leave bank deductions may be made when the employee is absent from work for a day or more for personal reasons (sickness and disability are not considered "personal reasons")—like inclement weather—when the office is open. Alternatively, an employer may place an exempt employee, who has *no* accrued benefits in the leave bank account, on an *unpaid* leave for the *full day(s)* the employee fails to report to work due to inclement weather when the office is open.

Because improper deductions can be costly, employers must be extra careful when considering making leave and salary deductions for exempt employees, including in a snow emergency situation. If you are not sure about whether or not a deduction is permissible, check with legal counsel to ensure that you are making the appropriate decision.

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Employer Precautions in Winter Weather



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The winter months frequently bring snow and ice, which create slippery conditions on and about employers' premises. Depending on the circumstances, an employer may be liable for workers' compensation benefits to an employee who sustains an injury after a slip and fall on the employer's premises.

If an employee is injured from a fall on snow or ice off the employer's premises and is in the course of his or her employment, a workers' compensation claim will likely be allowed. A good example of a situation where a claim would arise is where a delivery person is making a delivery to a customer.

In that instance, a claim will be allowed, as the delivery person's injuries were incurred in the course of his or her employment and arose out of his or her employment, although the injuries occurred off the employer's premises.

Less clear is the situation where an employee is either in the process of reporting to work, or leaving work, when he or she is injured as the result of a slip and fall. In the instance where an employee is on the employer's premises and falls on its sidewalk or steps leading to the building, his or her claim will likely be allowed, as he or she is within the "zone of employment." This is the

case although the actual work day may have not yet begun or has ended. If the employer provides a parking lot where the employee is required to park, and the employee is injured after slipping on snow or ice there, the claim which follows will likely be allowed, again because the employee is within the “zone of employment” in an area under the employer’s control.

In some instances where the employer’s business is one of several within an office complex over which the employer has no control over the removal of snow or ice, a claim will be allowed. Again, the theory behind the allowance is that the employee was in the “zone of employment.” Moreover, in that circumstance, the employee often must park

in an area provided by the landlord, close to his or her place of work.

As a precaution, employers are advised to keep premises clear of snow and ice during the winter, and if the employer does not have direct control of the property surrounding its place of business, to insist that the landlord provide efficient snow and ice removal. Such measures will help prevent injuries resulting from slipping and falling during the winter, and reduce workers’ compensation liability.

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